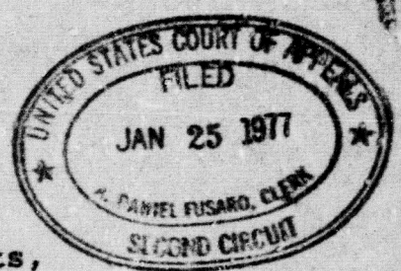
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7574

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



LOUIS BLECKER and RUTH BLECKER,

Plaintiffs-Appellants,

v.

LAZARD FRERES & CO., MEDIOBANCA BANCA di CREDITO FINANZIARIO-SOCIETA PER AZIONI, LES FILS DREYFUS ET CIE, S.A., LAZARD FRERES ET CIE and INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Defendants-Appellees.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases — Page

PRELIMINARY STATEMENT

Plaintiffs-appellants appeal from the District Court's refusal to enjoin settlement proceedings in a related action in New York State Supreme Court. In their brief on appeal, plaintiffs-appellants also seek to attack: (1) the District Court's continued stay of this derivative action in favor of other derivative actions containing identical claims; and (2) the District Court's refusal to transfer this action to the District of Connecticut. For the reasons set forth below, the appeal is frivolous.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court's denial of plaintiffs-appellants' motion for a temporary restraining order and order to show cause for a preliminary injunction constitute an abuse of discretion?

2. Does this Court have jurisdiction to review by interlocutory appeal the latest efforts of plaintiffs-appellants to overturn the District Court's stay of this case?

3. Does this Court have jurisdiction to review by interlocutory appeal the refusal of the District Court to transfer this action to another district?

COUNTERSTATEMENT OF THE CASE

This is the third occasion on which plaintiffs-appellants have sought an interlocutory appeal to this Court since this derivative action was filed on September 21, 1973. Plaintiffs are allegedly shareholders of International Telephone and Telegraph Corporation ("ITT"). They claim that in connection with the 1970 exchange offer made by ITT to shareholders of the Hartford Fire Insurance Company, the defendants other than ITT defrauded ITT in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 of the Securities Exchange Commission. Since those allegations are identical to the claims made in the previously-filed action of Bernstein v. Mediobanca, et al., 73 Civ. 3549 (WCC), Judge Tenney granted defendants' motion for a stay of the Blecker action in an opinion dated December 11, 1973[1/] and an order dated January 14, 1974 (A. 6).

Plaintiffs-appellants thereupon moved for reargument of defendants' motion to stay or, in the alternative, for certification of Judge Tenney's ruling for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge

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1/ CCH Sec. Law Rept. ¶ 94,306.

Tenney denied both motions in an opinion dated January 18, 1974 (A. 7).

Plaintiffs-appellants moved to vacate Judge Tenney's stay pursuant to F.R.C.P. 60(b), alleging that plaintiff's counsel in Bernstein faced a conflict of interest due to his alleged simultaneous representation of a plaintiffs' class in an action entitled Herbst v. ITT, Civ. No. 15,155 (D. Conn.). This motion was denied without opinion on February 4, 1974 (A. 2). Plaintiffs-appellants then sought to overturn Judge Tenney's order by seeking a writ of mandamus from this Court to compel Judge Tenney to vacate the stay. The petition was summarily denied by this Court on February 27, 1974 (A. 2).

Plaintiffs-appellants' fourth attempt to circumvent the stay order involved filing an amended complaint on March 6, 1974, assertedly as a matter of course pursuant to F.R.C.P. 15(a). Plaintiffs simultaneously moved to vacate the stay on the ground that the amended complaint raised issues not presented in the Bernstein case. However, the amended complaint merely contained the original allegations -- which remain identical to the claims first raised in Bernstein -- and various new claims which mirrored allegations raised in another derivative

suit also filed in the Southern District, Boehm v. Bennett, 74 Civ. 1132 (WCC). Defendants opposed both the filing of the amended complaint and plaintiffs' motion to vacate the stay. In an opinion and order dated May 2, 1974, Judge Tenney allowed the amended complaint by leave of court, but again refused to vacate the stay (A. 11).

Plaintiffs-appellants thereupon made a fifth -- and equally futile -- attempt to overturn the stay by appealing Judge Tenney's May 2, 1974 order to this Court. Defendants, in turn, moved to dismiss the appeal, arguing that Judge Tenney's stay order was neither a "final decision" within the meaning of 28 U.S.C. § 1291, nor an interlocutory order in the nature of an injunction within the meaning of 28 U.S.C. § 1292(a)(1). In an order dated June 11, 1974, this Court granted the motion to dismiss plaintiffs' appeal (A. 3).

Plaintiffs-appellants thereafter moved twice more to vacate the stay, but those motions were denied in memoranda and orders of March 14 and December 10, 1975 (A. 4). The latter memorandum noted that the arguments to vacate had been previously considered, "ad taedium if not ad nauseum," in prior memoranda.[2/]

2/ Memorandum-Opinion #43509 dated Dec. 10, 1975, p. 2.

Notwithstanding these repeated denials of their efforts to overturn the stay, plaintiffs-appellants subsequently moved on May 26, 1976 to file a second amended and supplemental complaint (A. 19) and on July 26, 1976 again to vacate the stay (A. 151). While the motions were pending sub judice before the District Court, plaintiffs-appellants moved to enjoin ITT from proceeding with settlement proceedings involving other derivative actions in Shapiro v. Black, et al., Civ. No. 20191/1976 (Supreme Court, State of New York, County of New York) (A. 183). The motion for an injunction was denied by endorsement on October 29, 1976. This appeal followed.

COUNTERSTATEMENT OF THE FACTS

This case, together with several other pending actions in various state and federal courts, arises from two transactions: the exchange offer made in 1970 by ITT to shareholders of Hartford Fire Insurance Company; and a sale made by ITT in 1969 of Hartford Fire stock that it had acquired independently of the subsequent exchange offer. The 1969 transaction involved 1,741,348 shares of Hartford Fire stock sold by ITT to a large

Italian bank, Mediobanca S.p.A., which subsequently sold to third parties an equal number of shares of ITT Cumulative Preferred Stock which it had obtained for its Hartford Fire shares under the exchange offer.

As stated above, this case involves various violations of the securities laws allegedly committed by the defendants other than ITT in connection with the Mediobanca transaction. The claims made here are essentially identical to those previously asserted in two other derivative actions also filed in the Southern District, one of which has subsequently been transferred to the District Court for the District of Connecticut.[3/] Other derivative cases arising from the same transactions are pending in state courts in New York and Delaware.[4/] A class action relating to the exchange offer is pending in the District Court for the District of Connecticut.[5/]

Elaborate discovery and other proceedings have been held in various of the pending cases, as well as before

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3/ Bernstein v. Mediobanca, et al., 73 Civ. 3549, and Boehm v. Bennett, et al., Civ. No. H-76-251 (D. Conn.).

4/ Auerbach v. Brown, et al., File No. 10865/73 (Supreme Court of New York, Westchester County); Shapiro v. Black, et al., Index No. 20191/76 (Supreme Court of New York, New York County); Auerbach v. Day, et al., Civ. Action No. 4481 (Chancery Court of Delaware, New Castle County).

5/ Herbst v. ITT, et al., Civ. No. 15,155 (D. Conn.).

federal agencies. In particular, the plaintiffs in the Herbst case have engaged in voluminous discovery, including numerous depositions and the production of thousands of pages of documents. Following an appeal to this Court and other extensive proceedings in that case, the parties entered into a proposed settlement involving, among other things, releases to ITT's directors discharging them from liability to ITT in connection with claims arising out of the ITT-Mediobanca transaction. On August 11, 1976, following notices to the class and ITT shareholders, as well as other proceedings,[6/] the District Court in Herbst declined to pass on the proposed releases and, accordingly, disapproved the settlement.[7/] It stated that the proposed releases that would have the effect of terminating the derivative actions should be considered in those cases. The court specifically found that the proposed stipulation of settlement is "fair, reasonable and adequate with respect to the plaintiff class."

All of the parties in the Shapiro, Auerbach, Bernstein and Boehm cases thereafter entered into a proposed settlement of those cases. The agreement provided that a new

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6/ In connection with those proceedings, the Boehm case transferred, without objection from the parties, from the Southern District to Connecticut.

7/ The court did not reject contemplated releases by ITT of other defendants in Herbst from liability for the consideration to be paid by ITT to settle that action.

complaint, embodying all of the claims made in those cases, would be filed in the Supreme Court of New York County, together with a proposed Stipulation of Settlement. The new complaint and Stipulation of Settlement have now been filed, sub nom. Shapiro v. Black, et al., Index No. 20191/1976. The plaintiffs in this case were invited to participate in the discussions which led to the new complaint and settlement proposal, but they declined to do so (A. 315-16). Extensive memoranda and other materials have been submitted to the state court, and it is now considering approval of the proposed settlement. Plaintiffs here have informed the state court that they are opposed to the settlement. If the settlement were to be approved by the state court, it would still presumably be necessary for the District Court to determine what implications the settlement, and the releases projected therein, might have for the maintenance of this case. The District Court has, however, quite properly not attempted to make any such determination prior to the decision of the state court.

A special committee of disinterested members of the Board of Directors of ITT has carefully examined the various claims made in the cases described above, and concluded that the proposed settlements in Herbst and the new Shapiro action in the New York state courts are a fair and reasonable disposition of that litigation.

ARGUMENT

I. The District Court's Denial of Plaintiffs-Appellants' Motion for a Temporary Restraining Order and an Order To Show Cause for a Preliminary Injunction Did Not Constitute an Abuse of Discretion.

A. Scope of Review.

It is rudimentary that the test on appeal is not whether the appellate court in its discretion would have granted or denied the injunction, but instead whether the district court has abused its discretion ands its decision was clearly erroneous. 7 J. Moore, Federal Practice ¶ 65.04[2] at 65-47 - 65-55 (1975 ed.); Sanders v. Air Line Pilots Ass'n, International, 473 F.2d 244, 249 (2d Cir. 1972); Stamicarbon N.Y. v. American Cyanamid Co., 506 F.2d 532, 536-37 (2d Cir. 1974). Appellate courts have a "very limited" scope of review over interlocutory orders granting or denying a preliminary injunction. Ames v. Associated Musicians of Greater New York, 359 F.2d 777, 778 (2d Cir. 1966). See also Carroll v. Associated Musicians of Greater New York, 284 F.2d 91, 92 (2d Cir. 1960); Huber Baking Co. v. Stroehmann Bros. Co., 208 F.2d 464, 467 (2d Cir. 1953).

B. Plaintiffs-Appellants Have Made No Showing of Irreparable Harm or Probability of Success on the Merits.

A party seeking to obtain preliminary injunctive relief must (1) show that it is threatened with irreparable injury if such relief does not issue, (2) make a "clear showing" of probable success on the merits, and (3) show that others will not suffer significant injury if an injunction is issued. Societe Comptoir de l'Industrie v. Alexander's Department Stores, Inc., 299 F.2d 33, 35 (2d Cir. 1962). Accord: Sanders v. Air Line Pilots Ass'n, International, supra, 473 F.2d at 248; Stark v. New York Stock Exchange, 466 F.2d 743, 744 (2d Cir. 1972); Checkers Motor Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969). In addition, the burden of proof is on the party seeking injunctive relief. Stark v. New York Stock Exchange, supra, 466 F.2d at 744.

The requirement of showing irreparable harm

> "necessitates more than a mere showing that the party seeking relief will see its relative position deteriorate. Preliminary injunctive relief is extraordinary relief. It requires a convincing demonstration that the balance of hardships tips decidedly toward the moving party." Sanders v. Air Line Pilots Ass'n, International, 473 F.2d 248.

Accord: Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966).

As stated above, plaintiffs-appellants were invited to participate in the discussions which led to the new complaint and settlement proposal in Shapiro, et al. v. Black, et al., but they declined to do so. Any theoretical harm which plaintiffs-appellants may suffer as a result of their non-participation in these proceedings is wholly self-imposed. Moreover, even if the Shapiro settlement were to be approved by the state court, plaintiffs-appellants would then be able to argue to the District Court regarding the implications of that settlement for this case. In the meantime, an independent state proceeding exists in which plaintiffs-appellants have already expressed their views regarding the proposed settlement. In these circumstances, they cannot be irreparably injured from the continuance of the state proceeding.

Since plaintiffs-appellants have failed even to attempt to satisy their burden of making the required clear showing of probable success on the merits, no response is necessary on that point.

C. The District Court's Denial of Plaintiffs-Appellants' Motion To Enjoin State Court Proceedings Was in Accord with the Federal Anti-Injunction Statute, 28 U.S.C. § 2283.

Even assuming arguendo that plaintiffs-appellants had been able to make a colorable showing of irreparable harm and probability of success on the merits, the District Court's denial of the requested injunctive relief was required by the general proscription against federal court injunctions of state court proceedings, which is embodied in 28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction to protect or effectuate its judgments."

Since 1793[8/] Congress has, "subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Younger v. Harris, 401 U.S. 37, 43 (1971).[9/] Time and again, this Court has adhered to the unequivocal admonition of of the Supreme Court:

8/ 1 Stat. 335, c. 22, § 5 (1793): "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state. . . ."

9/ Although the Younger v. Harris rule arose in the context of criminal proceedings, it has subsequently been applied to civil proceedings as well. See, e.g., Huffman v. Pursue, 420 U.S. 592 (1975); McCune v. Frank, 521 F.2d 1152, 1157 (2d Cir. 1975).

> "[W]e do not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 243 (1972).

See, e.g., McCune v. Frank, 521 F.2d 1152, 1157-58 (2d Cir. 1975); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975); Heyman v. Kline, 456 F.2d 123, 131-32 (2d Cir.), cert. denied, 409 U.S. 847 (1972). Moreover, it is clear that § 2283 may not be avoided by addressing the injunction to a party instead of to the state court. Sperry Rand Corp. v. Rothlein, 288 F.2d 245, 247 (2d Cir. 1961). Given this clear general proscription against federal court injunctions of state court proceedings, and in the absence of any meaningful showing that an injunction is needed to aid its jurisdiction, the District Court would have abused its discretion if it had granted plaintiffs-appellants' motion.

II. Plaintiffs-Appellants Cannot Appeal the District Court's Denial of the Motion To Vacate the Stay, and Their Appeal of the Stay Order Is Not Before This Court and Should Be Dismissed.

Since Judge Tenney first stayed this case on January 14, 1974 (A. 6), plaintiffs-appellants have, as Judge Conner

has emphasized, engaged in a "never-ending series of attempts . . . to overturn the stay."[10/] This appeal is merely the latest such effort. The first two issues on appeal, as stated by plaintiffs-appellants, seek appellate review of the District Court's failure to rule on their most recent motion to vacate the stay, and the third issue again seeks review of the stay order itself (A. 2). All of these matters are, as this Court has already held, patently inappropriate for appellate review.

Although plaintiffs-appellants have not stated the purported basis for this Court's jurisdiction over their latest appeal on the stay issues, it is apparent that any such appeal must be based on one of two grounds:

(1) They must establish that the stay order and the failure to rule on the motion to vacate the stay are "final decisions" within the meaning of 28 U.S.C. § 1291; or

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10/ A. 4; Memorandum-Opinion #42046 dated March 14, 1975, p. 2.

(2) They must establish that the stay order and the failure to rule on the motion to vacate the stay are interlocutory orders "granting, continuing, modifying, refusing or dissolving [an] injunction" within the meaning of 28 U.S.C. § 1292(a)(1).

As this Court has already ruled in this same case, neither of these jurisdictional bases can conceivably support an appeal of the stay issues. The District Court's failure to rule on the newest motion to vacate the stay is manifestly not an "order," much less a "final decision."[11/] The question of whether an order staying a derivative action pending determination of a similar derivative action in another forum can be appealed under 28 U.S.C. §§ 1291 or 1292(a)(1) has long since been answered in this Circuit. In Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949), this Court dismissed the appeal of such a stay order, stating:

11/ To the extent that this appeal might be treated as as a request for relief in the form of mandamus, it should be noted that this Court has already considered and summarily denied such relief in this case.

> "It is quite true, as the defendant alleges, that the order is no more than a continuance in the action at bar, and not a modern procedural substitute for a decree in chancery, enjoining the prosecution of an action at law. Therefore it is not within the doctrine of Enelow v. New York Life Ins. Co., 293 U.S. 379 . . . . That it is not a final order needs no argument. For this reason the appeal must be dismissed. . . ." Id., at 309.

The rule in Mottolese has been consistently followed both in this Circuit and elsewhere. See, e.g., Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 192 (2d Cir.), cert. denied, 350 U.S. 825 (1955); Arny v. Philadelphia Transportation Co., 266 F.2d 869, 870 (3rd Cir. 1959); International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583, 585 (4th Cir. 1953); Jackson Brewing Co. v. Clarke, 303 F.2d 844, 846 (5th Cir.), cert. denied, 371 U.S. 891 (1962).

The applicability of Mottolese to the present appeal is apparent, just as it was in connection with plaintiffs-appellants' first appeal to this Court. The stay of this case is by no means a final order, but rather can be modified or vacated at any time within the discretion of the district judge. Cf., Landis v. North American 299 U.S. 248, 254 (1936); Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949). Hence, the order cannot be appealed pursuant to Section 1291. Similarly, the instant stay order is not of the type which is appealable

under Section 1292(a)(1). The criterion for determining whether a stay order is appealable under that section was set forth by the Supreme Court in Enelow v. New York Life Insurance Company, 293 U.S. 379, 381-82 (1935), cited by this Court in Mottolese v. Preston, supra:

> "This section [the predecessor of Section 1292(a)(1)] contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice." (Emphasis supplied.) Accord, Penoro v. Rederi A/B Dica, 376 F.2d 125, 128-29 (2d Cir. 1967).

Consequently Section 1292(a)(1) is also inapplicable as a basis for appeal.[12/]

The District Court properly determined that it was in the best interest of justice to stay proceedings

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12/ As described above, plaintiffs-appellants previously attempted to appeal Judge Tenney's May 2, 1974 stay order (A. 11), and ITT moved to dismiss the appeal, arguing, as it does here, that the order was neither a "final decision" within the meaning of 28 U.S.C. § 1291 nor an interlocutory order within the meaning of 28 U.S.C. § 1292(a)(1). Docket No. 74-1695. This Court granted ITT's motion to dismiss the appeal (A. 3), and this decision constitutes the law of the case with respect to the interlocutory appealability of the stay order.

here pending the orderly disposition of identical cases in the same district. It would be wasteful and burdensome to the courts and parties to go forward with duplicative discovery and other proceedings in connection with such identical cases. Since the issuance of the stay, however, plaintiffs-appellants have seized upon every procedural expedient in their efforts to circumvent or overturn the District Court's order. This appeal, like the two prior efforts before this Court, is patently without merit. The repeated efforts of plaintiffs-appellants to bring this matter to this Court represent nothing less than an abuse of the Court's processes.

III. Plaintiffs-Appellants Cannot Appeal the District Court's Refusal To Transfer This Action to the District of Connecticut.

Plaintiffs-appellants unaccountably state that one issue on appeal here is whether this action should be transferred to the District of Connecticut. There are two simple and direct answers to this question. First, plaintiffs-appellants are not appealing from a denial of a motion brought under 28 U.S.C. § 1404(a) to transfer this case; they are instead appealing only the denial of motions for a temporary restraining order and to show cause for a preliminary

injunction (A. 113). Second, even if a transfer question were at issue on this appeal, the law is crystal clear that "an order transferring or refusing to transfer an action to another district or division is an interlocutory order and is non-appealable except by certification under 28 U.S.C. § 1292(b)." 9 J. Moore, Federal Practice ¶ 110.13[6] at 173-174 (1975 ed.).[13] No such certification was asked for or made in this case. Thus, even if it were assumed that this question were at issue here -- which it clearly is not -- this Court lacks jurisdiction to hear the appeal and the appeal should therefore be dismissed as to this issue.[14]

13/ See also cases cited therein at 173 n. 3; Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir.), cert. denied, 340 U.S. 851 (1950).

14/ We also note that no effort has been made to show that this case satisfies the requirements of Section 1404(a). This is scarcely surprising, since no such showing is possible. The Herbst case, now pending in Connecticut, is a class action, not a derivative action, and there is no reason to assume that this case could be more expeditiously or efficiently resolved there. The Boehm case was transferred to Connecticut in connection with a proposed settlement of Herbst which has now been rejected, at least temporarily, by the court there. It is apparent that transfer is intended by plaintiffs-appellants merely as another artifice to circumvent the stay.

CONCLUSION

For the reasons stated above, this Court should affirm the District Court's denial of plaintiffs-appellants' motion for a temporary restraining order and order to show cause for a preliminary injunction, and should dismiss the appeal insofar as it seeks review of questions pertaining to the stay order issued by the District Court and the District Court's refusal to transfer this action to another district.

Respectfully submitted,

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January 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached defendants-appellees' brief was mailed, postage prepaid, this 24th day of January, 1977, to:

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